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AB 1158 – ELDER ABUSE TESTIMONY

PURPOSE

AB 1158 allows for the examination of a witness to be conducted by a two way video conference if the court determines that a witness is unable to attend the examination in person.

SUMMARY

Penal Code section 1340 provides a defendant with the right to be present in person and with counsel during the conditional examination of a witness.

AB 1158 modifies section 1340 to also allow the conditional examination of a witness to be conducted by a contemporaneous two way video conference, in which the parties and the witness can see and hear each other via electronic communication, if the court determines that a witness to be examined is so sick or infirm as to be unable to attend the examination in person.

BACKGROUND

Current law does not explicitly allow conditional examinations via two way video conference. This poses a problem if a senior becomes too sick to appear in court to

testify, since it makes it difficult, if not impossible to successfully prosecute a case. Elders who are weak or infirm are common targets for those who prey upon them. Due to the age of many senior victims, the risk of incurring health problems or even death before trial is increased.

Further exacerbating this problem is that seniors who are in poor health often choose to relocate, or are relocated by other family members, after it has been discovered they were victimized, either financially or physically. The San Francisco District Attorney's Office has prosecuted cases in which elders have moved to Canada, Alabama, Hawaii and Australia after becoming victims of financial crimes. Due to the length of time that financial abuse cases take to investigate, it can often be months after the initial discovery of the crime that a person is charged with a crime. This situation can be made more difficult by the fact that family members often want to act very quickly to relocate the elder once they have discovered that a crime has been committed.

Prior to 2004, one solution to this problem was found in Evidence Code section 1380. That section, which was enacted in 1999 (AB 526 – Zettel), provided that the prosecution could memorialize, in a

videotape, an out of court interview of an elder performed by a peace officer, even before a prosecutor ever charged the case. Section 1380 allowed the police to, shortly after discovering the crime, and before any relocation of the victim occurred, interview the victim on videotape. Then, if the victim relocated and was too infirm to come back to court, prosecutors could still use the previous videotaped interview as evidence in their case in chief. However, in 2004, the U.S. Supreme Court announced its decision in *Crawford v. Washington*, which, for all intents and purposes, gutted EC section 1380. Now, elder abuse prosecutors in California are forced to obtain conditional examinations at the earliest opportunity once a case is filed.

Video conference examinations have grown in importance after the demise of section 1380. This development, in conjunction with the increasing number of seniors relocating after victimization, has heightened the need for this legislation. The technology for a two-way video conference examination is also becoming more available. In San Francisco County Superior Court, one court room was redesigned in 2005 to perform video conferences. A San Francisco Deputy District Attorney reported that the redesign allowed him to perform a two-way video conference examination with an elder victim living in Ontario, Canada whose doctor felt she could not travel back to San Francisco due to health reasons. As a result of that examination, the victim's testimony was preserved, and the defendant eventually pled guilty and was sentenced to three years in state prison. Although the defense counsel did not object to the video conference examination procedure in that case, defense counsel may object to such proceedings in the future. Under the current law, it is not clear that the courts, hearing such objections, will necessarily permit the

examinations. This legislative change will ensure that the testimony of victimized seniors will be preserved despite unexpected or unpreventable circumstances, while at the same time respecting the constitutional rights of the defendants charged with abusing such elders.

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